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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHALESE KATHLEEN BARBER,

Defendant and Appellant.

G054821

(Super. Ct. No. 15HF0904)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Jonathan S. Fish, Judge. Affirmed.

William Paul Melcher, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Senior Assistant Attorney General, Arlene A. Sevidal and Minh U. Le, Deputy Attorneys General, for Plaintiff and Respondent.

Shalese Kathleen Barber appeals from a judgment after a jury convicted her of three counts of child abduction. Barber argues the trial court erred by ruling she could not offer the good cause statutory defense and excluding evidence that would have negated the malice element. The Attorney General concedes the evidentiary error but asserts it was harmless. He also contends Barber failed to make an offer of proof to support the statutory defense. We agree with the Attorney General on both counts, and affirm the judgment.

FACTS

A. Substantive Facts

Barber and B.K. (Father) were married for 16 years, and they had three children—J.K. (born in 2000), K.K. (born in 2002), and T.K. (born in 2010). They lived in Utah. In late 2014, E.K., a five-year-old girl, moved in with the family. Father was a truck driver who worked long hours during the graveyard shift. Barber stayed home and cared for the children. She was also in charge of the family's finances.

In March 2015, Barber accused Father of infidelity. Barber pushed, slapped, and hit Father in the face. When Father's family came over that evening, Barber excluded Father from the visit. After Father's family left, Father slept on the couch until the following evening when Barber slapped him and dumped cold water on his head. Father left for work. While Father was at work, Barber sent him a text message that told him to live with his mother for a couple weeks. When he got off work, Father called and sent texts to Barber, but she did not respond. From that point, he stayed at his mother's home.

A couple days later, Father went home to speak with Barber and get clothes and tools. Barber came outside and yelled at and belittled Father in front of his daughter and his cousin, who accompanied him. Barber did not allow him to get his things. Father called the police.

A few weeks later, Father went home and found his clothes in garbage bags on the front lawn. His clothes were cut up. On another occasion, Father went home and found pictures of him and his children cut up on the ground. In the three months after Barber told him to leave, Father was not able to see all of his children. He saw T.K. and E.K. on weekends, and he saw K.K. once. When Father tried to see his other children, Barber said he “could only see the youngest two.”

After Memorial Day in 2015, Barber obtained a protective order against Father. Father hired an attorney who advised him to stop depositing his paycheck into their joint account. While the protective order was in effect through July 1, 2015, Father was not able to see his children. Father continued paying the utilities and made three delinquent mortgage payments.

On July 1, 2015, Father went to court, and the court dismissed the protective order. Barber and T.K. were present at the hearing.

A few days later, Father went home and found it abandoned and “ransacked.” Barber’s minivan was gone. Father went to the police and reported the children missing. He searched for Barber and contacted her family, but he was unsuccessful. He learned Barber deactivated her cell phone sometime in July.

When he could not locate Barber, Father petitioned for a court order requesting custody of the children. He also filed for divorce. Father never gave Barber consent to take their children. On July 22, 2015, the court granted Father sole legal and physical custody of the children. The court extended that order on July 29, 2015, and August 14, 2015. The order was in effect until August 26, 2015.

On August 14, 2015, an Orange County Sheriff’s deputy conducted a welfare check on Barber and the children at a motel in San Clemente. One of the deputies spoke with Father and Barber’s mother before contacting her at the motel. At the deputy’s request, Father sent the custody order to the Orange County Sheriff’s

Department (OCSD). When the deputy contacted Barber, she was in the motel room with the children. He asked them to accompany him to the station to discuss custody issues.

At the station, the deputy retrieved the copy of the custody order. An OCSD investigator, Jason Perez, interviewed Barber at the station. After another investigator advised Barber of her rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, Barber admitted she received a court order, which she showed the investigators; it was the same order Father sent. Barber explained she received the order sometime after July 31, 2015, while she was staying in a Utah motel. Before she received the order, police contacted her at a grocery store regarding the order, but they did not have the order to give her. The order was faxed to Peace House, the Utah shelter where Barber had previously been staying. A Peace House employee, Lissette Tapia, delivered the order to Barber at the motel.

Barber said she did not immediately read the order because she was “stressed about the situation” and “needed to leave with her children.” She and the children drove to San Diego, where she read the order two days later. She arrived in San Diego two weeks prior to her arrest. Barber acknowledged to Perez that she knew her “children were supposed to go back to her husband.” She told Perez, ““So, I looked it up, and it said like if you haven’t been served with it, hand served with it, then you didn’t get it.””

Perez arrested Barber, and the children were transported to the Orangewood Children’s Home. Father was reunited with K.K. and T.K. a week or two later. He was reunited with J.K. four months later.

B. Procedural Facts

An information charged Barber with three counts of child abduction between August 2, 2015, and August 14, 2015 (Pen. Code, § 278.5, subd. (a), all further statutory references are to the Penal Code).

Before trial, the prosecutor moved to exclude all evidence Barber abducted the children to protect them from Father and any affirmative defenses based on that evidence (Evid. Code, § 402). The prosecutor alleged that on July 22, 2015, the court granted Father full legal and physical custody of the children, and J.K. would live with Barber's mother pending further investigation. The prosecutor added the court extended that order twice, effective until August 26, 2015. Finally, the prosecutor contended Barber failed to comply with section 278.7, subdivision (c)'s reporting requirements.

At the hearing on the in limine motions, the parties argued the admissibility of the evidence under the statutory and common law necessity defenses. Relying on *People v. Neidinger* (2006) 40 Cal.4th 67 (*Neidinger*), defense counsel stated she wanted to present evidence concerning the section 278.7 defense to establish the prosecution failed to prove malice because they were interrelated. Counsel's offer of proof was a Peace House employee, Chelsea Benetz, could testify to Barber's reaction and conduct after she heard J.K.'s allegation Father raped J.K. Counsel asserted the issue was not whether J.K.'s allegation was true but the allegation's effect on Barber and whether she acted in her children's best interests. The trial court asked counsel whether she had proof of all three requirements for the statutory defense provided in section 278.7, subdivision (c). Defense counsel twice indicated she only had proof of the first requirement. When the court asked counsel how she could present the defense when she did not have evidence of all three elements, counsel replied, "I think I can still raise a reasonable doubt as to that defense." As for the common law necessity defense, counsel argued she had sufficient evidence to present it to the jury. The court took the issues under submission.

The next morning, the trial court asked defense counsel for an offer of proof as to each element of the common law necessity defense. Counsel made her offer of proof, and there was a discussion whether section 278.7 subsumed the common law defense. The court declared a recess for the morning.

That afternoon, counsel argued the issue of whether the statutory defense subsumed the common law defense—the trial court concluded it did not. The court asked defense counsel whether she wanted to call any witnesses or offer any other evidence, and counsel submitted.

The trial court stated it considered the proceeding as an Evidence Code section 402 hearing. As to the common law necessity defense, the court opined there was insufficient evidence to support that defense; Barber does not dispute this on appeal. With respect to the statutory defense, the court concluded there was insufficient evidence of section 278.7, subdivision (c)'s three elements (*People v. Mehaisin* (2002) 101 Cal.App.4th 958 (*Mehaisin*)). The court thus ruled Barber could not present either the common law or statutory necessity defenses. However, the court ruled Barber could present evidence to attack the malice element and detailed the evidence she could present. In clarifying its rulings, the court stated evidence Father sexually abused J.K. was inadmissible. Additionally, the court ruled evidence about how Barber reacted when she heard the allegation Father sexually abused J.K. was inadmissible.

At trial, the prosecution offered the evidence detailed above. The court order granting Father full custody, and subsequent orders extending that order through August 26, 2015, were admitted into evidence.

Chelsea Benetz, Peace House clinical director, testified Peace House provides shelter and support for women and children in crisis. She stated that in July 2015, Barber and her children were residents. Benetz explained she told Barber that J.K. had made an accusation against Father, which left Barber in shock and “speechless.” Benetz filed a report with the Utah Department of Child and Family Services but never spoke to Father. Tapia testified that after the police contacted Barber at the grocery store and she returned to the Peace House, Tapia drove Barber and her children to a nearby motel.

A jury convicted Barber of all counts. The trial court imposed a three-year prison sentence on one of the counts and concurrent terms on the other two counts. Because of her credits, Barber had completed her sentence, and she was released.

DISCUSSION

I. Statutory Good Cause Defense

Barber argues the trial court erred by denying her request to present the section 278.7 defense. We disagree.

A trial court has a duty to instruct on a particular defense “‘only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant’s theory of the case.’” (*People v. Barton* (1995) 12 Cal.4th 186, 195.) “Although a trial court should not measure the substantiality of the evidence by undertaking to weigh the credibility of the witnesses, the court need not give the requested instruction where the supporting evidence is minimal and insubstantial.” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1145, fn. omitted; *United States v. Bailey* (1980) 444 U.S. 394, 416.)

Section 278.5, subdivision (a), provides, “Every person who takes, entices away, keeps, withholds, or conceals a child and maliciously deprives a lawful custodian of a right to custody, or a person of a right to visitation,” is guilty of a crime punishable by up to three years in prison.

Section 278.7, subdivision (a), provides as follows: “Section 278.5 does not apply to a person *with a right to custody* of a child who, with a good faith and reasonable belief that the child, if left with the other person, will suffer immediate bodily injury or emotional harm, takes, entices away, keeps, withholds, or conceals that child.” (Italics added.) Section 278.7’s affirmative defense is subject to the following conditions: made a report, within a reasonable time, to the district attorney of the county where the child previously resided; and file a custody proceeding, within a reasonable time, in a court of competent jurisdiction. (§ 278.7, subd. (c).) Section 278.7,

subdivision (d), defines “reasonable time” as follows: “[A] reasonable time within which to make a report to the district attorney’s office is at least 10 days and a reasonable time to commence a custody proceeding is at least 30 days. This section shall not preclude a person from making a report to the district attorney’s office or commencing a custody proceeding earlier than those specified times.”

Here, the trial court ruled Barber’s proffer concerning section 278.7, subdivision (c)’s reporting requirements was insufficient. On appeal, Barber asserts the court misinterpreted the “reasonable time” requirements. We need not interpret section 278.7, subdivision (d)’s time requirements because Barber’s claim fails for other reasons. At the hearing on the in limine motions, defense counsel conceded she did not have evidence Barber complied with all section 278.7, subdivision (c)’s reporting requirements. Thus, there was not substantial evidence to support the defense. (*Mehaisin, supra*, 101 Cal.App.4th at p. 960 [court properly rejected defendant’s offer of proof for section 278.7 defense as insufficient].)

Additionally, Barber could not assert the statutory defense because she did not satisfy section 278.7, subdivision (a)’s first requirement—she was not “a person with a right to custody of” the children she abducted. The court orders granting Father sole custody of the children were in effect between July 22, 2015, and August 26, 2015. The information charged Barber with abducting the children between August 2, 2015, and August 14, 2015. Any claim she was unaware Father had sole legal custody of the children is belied by the record. A sheriff arrested Barber on August 14, 2015. Barber arrived in San Diego two weeks prior to her arrest. She read the court order two days later, sometime around the first of August. Indeed, Barber acknowledged to Perez that she knew her “children were supposed to go to her husband.”

Barber asserts we “should not seek to create a factual issue which was not entertained by the trial court.” It is well established “we are concerned with the correctness of the superior court’s determination, not the correctness of its reasoning.

[Citation.]” (*People v. Perkins* (2016) 244 Cal.App.4th 129, 139 [we may affirm trial court’s judgment if correct on any theory of law applicable to case].) The evidence established Father had sole custody of the children on the dates Barber was alleged to have abducted them, and Barber did not dispute this. (*Mehaisin, supra*, 101 Cal.App.4th at pp. 963-964 [defendant not entitled to statutory defense because not person with right to custody of child].) Therefore, the trial court properly concluded Barber could not assert the section 278.7 defense.

II. Evidentiary Issues

In her opening brief, Barber contends the trial court erred because “[she] should have been permitted to introduce evidence of the rape allegation to challenge the element of malice, even in the absence of the defense of necessity.” The Attorney General concedes the trial court should have admitted evidence of Barber’s conduct, through Benetz’s testimony, upon hearing the allegation Father sexually assaulted J.K. The Attorney General disputes, however, evidence of the rape allegation itself was admissible. In her reply brief, Barber clarifies her argument on appeal “is confined to evidence of [her] conduct, through Benetz, upon learning of the rape allegation.” We limit our discussion accordingly.

“[S]ection 278.5 requires that the person act ‘maliciously.’ Section 7, subdivision 4, states that this word ‘import[s] a wish to vex, annoy, or injure another person, or an intent to do a wrongful act’ The parties debate at length exactly how this definition fits in with section 278.7[, subdivision](a)’s belief requirement. The two concepts are not identical. But, in effect, the section 278.7[, subdivision](a) defense provides a specific example of when the person does not act maliciously.” (*Neidinger, supra*, 40 Cal.4th at p. 79.)

Although Barber could not assert section 278.7’s good cause defense because her proffer was insufficient, she was not precluded from presenting a defense she lacked malice. Section 278.7 does not prohibit defendants who failed to comply with its

reporting and custody proceeding requirements from presenting a defense they did not act maliciously. The prosecutor acknowledged Barber was free to challenge the prosecution's evidence on the malice element. Defense counsel elicited brief testimony from Benetz concerning Barber's reaction to J.K.'s accusation against Father, and during closing argument counsel referenced this evidence in arguing Barber lacked malice. The Attorney General concedes Benetz's testimony regarding Barber's reaction when she heard Father sexually assaulted J.K. was relevant and should have been admitted.

"It is . . . well settled that the erroneous admission or exclusion of evidence does not require reversal except where the error or errors caused a miscarriage of justice. [Citations.] '[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' (*People v. Watson* (1956) 46 Cal.2d 818, 836 . . .)" (*People v. Richardson* (2008) 43 Cal.4th 959, 1001.)"

Here, it was not reasonably probable Barber would have received a more favorable result had the court admitted *additional* evidence concerning Barber's reaction to J.K.'s allegation against Father. The defense's theory was Barber took the children and fled the family home and then to Utah to protect her children from Father. The evidence demonstrated Barber purportedly learned of J.K.'s allegation at Peace House. Barber's conduct before arriving at Peace House however was equally malicious. After Barber excluded Father from his home, she would not let Father see his children. There was evidence from which the jury could reasonably conclude Barber destroyed Father's clothes and pictures with him and his children. And Barber fled the family home with the children. This was all before J.K.'s allegation at Peace House. Additionally, had Barber truly feared for her children's safety she could have reported her concerns to the police in Utah or California; she did not. Thus, the evidence both before and after Barber learned

of J.K.'s allegation tended to demonstrate Barber acted with malice and not to protect her children from Father.

Finally, Barber was not precluded from presenting a defense, which would require us to evaluate the error pursuant to *Chapman v. California* (1967) 386 U.S. 18. (*People v. Cunningham* (2001) 25 Cal.4th 926, 994.) Again, the trial court did not prevent Barber from presenting any defense. The court erroneously excluded evidence, which is state law error and not a federal constitutional error. In any event, Barber's defense counsel elicited testimony from Benetz that when she told Barber that J.K. made an accusation against Father, Barber was in shock and "speechless." During closing argument, Barber's defense counsel argued Barber fled Utah with the children to protect them from Father, which the jury could have relied on to conclude Barber acted without malice. Thus, based on the entire record, we conclude Barber was not prejudiced.

DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

THOMPSON, J.